

*** HON'BLE SRI JUSTICE L. NARASIMHA REDDY**
AND
HON'BLE SRI JUSTICE CHALLA KODANDA RAM
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+ ITTA Nos. 144 OF 2002; 35 OF 2003 AND 479 OF 2012

% Dated 06-11-2014

Commissioner of Income Tax, Rajahmundry

...Appellant

VERSUS

\$ The Andhra Petrochemicals Ltd., agent of M/s. Mavy Mckee
(London) Ltd., Venkatarayapuram, Tanuku – 534 215, West
Godavari District

.....Respondent

! Counsel for the Appellant : Sri S.R. Ashok, Senior
Counsel

^Counsel for the Respondent: Sri Dastoor, Senior Counsel

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? Cases referred

- [1] (1968) 68 TTR 786 (MAD)
2 (2000) 243 ITR 459 (Mad)
3 (2011) 336 ITR 599

4 (1977) 109 ITR 158 (AP)
5 (2003) 262 ITR 110 (AP)
6 (2010) 329 ITR 442
7 (2014) 48 TAXMANN.COM 67 (Bombay)

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THE HON'BLE SRI JUSTICE L. NARASIMHA REDDY

AND

THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

ITTA Nos. 144 OF 2002; 35 OF 2003 AND 479 OF 2012

COMMON JUDGMENT: (per L. Narasimha Reddy, J)

Theses appeals are filed by the Revenue under Section 260A of the Income Tax Act, 1961 (for short, 'the Act') feeling aggrieved by the common order dated 11-04-2002 passed by the Visakhapatnam Bench of the Income Tax Appellate Tribunal (for short, 'the Tribunal') in ITA No. 721/Hyd/1996 and batch, referable to the assessment year 1988-89. The subject matter of the appeals before the Tribunal was an order passed by the assessing officer under Section 143(3) of the Act against the respondent by treating it as an agent of M/s. Davy McKee (London) Limited (for short, 'the foreign company').

Briefly stated, the facts are as under:

The respondent is a company incorporated under the Indian Companies Act, 1956 and is in the field of petro chemicals. It entered into collaboration-cum-service agreements with the foreign company. Under the respective agreements, the foreign company

was to supply and instal certain machinery and to transfer the relevant know-how. The total consideration was in the range of One Million US Dollars. The respondent was making payments to the foreign company in foreign currency, by applying for no objection certificate, referable to Rule 115 of the Income Tax Rules (for short, 'the Rules').

The respondent has been submitting its returns and paying income tax regularly. The assessing officer intended to treat the respondent, as the agent of the foreign company, in terms of Section 163 of the Act and to bring the payments made to the foreign company, under the purview of the income tax. A notice was issued in this behalf, and on a consideration of the objections raised by the respondent, the assessing officer passed an order dated 19-11-1990 under Section 163 (2) of the Act holding that the respondent is liable to be regarded and treated as the agent of the foreign company, for the assessment year 1988-89. Thereafter, he passed an order of assessment on 11-04-1991, with reference to the payments made to the foreign company, by treating the same as income. Similar order was passed for the assessment year 1989-90. As regards the assessment year 1992-93, the assessing officer refused to issue no objection certificate for remittance of the amount to the foreign company.

Feeling aggrieved by the three orders referable to the assessment years mentioned above, the respondent filed Appeal Nos. 208, 209 and 205/1995-96 before the Commissioner of Income Tax (Appeals-V), Hyderabad. Through a common order

dated 27-12-1995, the Commissioner partly allowed the appeals referable to the assessment years 1988-89 and 1989-90 and dismissed the appeal pertaining to the assessment year 1992-93. The respondent filed ITA Nos.721 and 722/Hyd/1996 feeling aggrieved by the order passed by the Commissioner in respect of the assessment years 1988-89 and 1989-90, before the Tribunal. Through its order dated 11-04-2002, the Tribunal allowed the appeals holding that the amounts paid to the foreign country cannot be treated as royalty and thereby cannot be taxed. Hence these appeals are filed by raising the following questions of law:

1. “Whether the Appellate Tribunal is justified in not holding that the amount received by the non-resident for parting with drawing and designs and technical know-how constitute ‘royalty’ on the anvil of Sec.9(i)(vi) of the I.T. Act Double Taxation Avoidance Act?”
2. “Whether the Appellate Tribunal is justified in not holding that the payment received by the non-resident for grant of ‘user’ right of drawings and designs and technical know-how constitutes royalty under the DTAA?”
3. “Whether the Appellate Tribunal is justified in holding that the transaction in the hands of non-resident is liable to be treated as out right sale of plant and the profit arising there from should be treated as business profit?”
4. “Whether the Appellate Tribunal is justified in holding that the agent of non-resident is not responsible for discharge of statutory obligation anterior to grant of recognition of such agency?”
5. “Whether the Appellate Tribunal is justified in setting aside levy of interest U/s.139(8) of I.T. Act?”

Sri S.R. Ashok, learned Senior Counsel for the appellant

submits that the view taken by the Tribunal that the amount received by the foreign company cannot be treated as royalty, is opposed to Section 9(1) and other relevant provisions of the Act, and the Rules. He submits that a perusal of the agreement between the respondent and the foreign company discloses that there was a clear transfer of patent, secret formulae, technical know-how and thereby the consideration paid therefor answered the description of 'royalty'. He submits that though the contract was in several parts, it was only for the sake of convenience and, at least the amount that is paid for the transfer of know-how or patents, ought to have been treated as royalty. He contends that the Tribunal has placed excessive liberal interpretation upon the Double Tax Avoidance (DTA) Agreement entered into between India and the United Kingdom and treated the transaction between the respondent and the foreign company, as covered by the same. Learned Senior Counsel submits that since the agreement has provided for restriction of usage of patent or other know-how, totally different legal consequences flow and thereby, the agreement stands taken away from the regime under Section 90 of the Act. He has taken us through the relevant provisions of law, the text of agreement between the respondent and the foreign company, the relevant clauses of DTA Agreement and certain precedents.

Sri Dastoor, learned Senior Counsel for the respondent, submits that the amount paid to the foreign company was nothing but the consideration for the part of a comprehensive contract, which involves supply of machinery, erection and transfer of

know-how, which was for a limited purpose. He submits that the entire agreement is covered by the regime under the DTA, and there was absolutely no basis for the assessing officer to levy income tax on the component of the alleged royalty. He submits that even where a foreign agency is otherwise liable to pay tax under the Act, different considerations altogether ensue, in case the contract is governed by a DTA, treaty or arrangement. He has placed reliance upon several precedents, including those in ***M.V.S. Kathirvelu Nadar vs. Commissioner of Agricultural Income Tax***^[1], ***Commissioner of Income Tax vs. Nayveli Lignite Corporation Ltd***^[2], both rendered by the Madras High Court; ***Commissioner of Income Tax vs. D.C.M. Ltd***^[3], rendered by the Delhi High Court, ***Commissioner of Income Tax vs. Hindustan Shipyard Ltd***^[4], ***Commissioner of Income Tax vs. Sundwiger EMFG & Co.***^[5], both rendered by this Court, ***Commissioner of Income Tax vs. Maggronic Devices (P) Ltd.***^[6] of the Himachal Pradesh High Court, ***Director of Income-Tax v. Haldor Topsoe***^[7] and some other decisions.

The basic facts are not in dispute. The respondent entered into an agreement with a foreign company for supply and installation of sophisticated items of machinery required in its plant. The agreement has also provided for the transfer of know-how needed for it. After the agreement was entered into, remittances in foreign exchange were made for two assessment

years i.e., 1988-89 and 1989-90, after obtaining the certificate under Rule 115 of the Rules. Some amount was to be paid for the third consecutive year. As required under law, an application was made for grant of certificate. At that stage, the assessing officer thought of bringing the amount paid or payable to the foreign company under the purview of the tax. As a first step, he passed an order under Section 163 of the Act treating the respondent as the agent of the foreign company. That order, by itself does not result in any prejudice to the respondent. It is only when an order of assessment is passed against it, in its capacity as agent, that the grievance is felt. With reference to the two assessment years, separate orders under Section 143(3) of the Act were passed imposing the tax liability vis-à-vis the amounts that were paid to the foreign company. For the assessment year, 1992-93, the permission for remittance was denied.

The respondent pleaded that what it made through the agreement with the foreign company is an outright purchase and no royalty whatever was paid. The assessing officer however took the view that a substantial amount of consideration is towards royalty for transferring the patent and other technical know-how and that the same is liable to tax. The arrangement between the respondent and the foreign company is covered by separate agreements, namely, (a) licence know-how and engineering agreement, (b) supply of equipment and materials agreement and (c) services agreement. The scope of the first agreement is spelt out in the preamble, which reads:

“(A) APL intends to install an Oxo Alcoholols plant

at Vizag in the Republic of India for the production of 2-ethylhexanol and butanols.

(B) APL intends to appoint Davy Powergas India Private Limited (or another Indian Contractor acceptable to both DML and APL) to render certain services in connection with the engineering, procurement of equipment, supervision of erection, start-up and commissioning of the said plant.

(C) DML has right in certain processes as hereinafter defined and has patent and licensing rights and confidential technical and commercial information and confidential know-how in relation to such processes.

(D) In consideration of the mutual covenants hereinafter set forth DML and APL have agreed that DML shall grant and APL shall accept certain rights in certain processes as hereinafter more particularly defined, and DML shall supply to APL know-how and front-end engineering package for the said plant.”

Clauses (A) and (B) are almost common for the other two agreements. Clause (C) of the other two agreements reads”

“DML and APL have entered into an Agreement (hereinafter called “the Licence, Know-How and Engineering Agreement”) dated the 30th day of October 1986, whereby DML undertakes to supply know-how, licence and front-end engineering package for the design, erection and operation of the said Plant and guarantees its performance on the terms therein appearing.”

Clauses (D) and (E) of the supply of equipment and material agreements read:

“(D) Certain critical/complex items of equipment of a proprietary nature which are required for said Plant are not readily/satisfactorily available in India. Such items must be properly designed and fabricated to

ensure safe and reliable operation of the said Plant.

(E) DML is able to supply such items from sources outside India and is willing to do so for the consideration and upon the terms and conditions hereinafter stipulated.”

Clause (D) of the service agreement reads:

“DML is prepared to assign an agreed number of its personnel to provide specialist advice on the detail engineering work to be carried out in India and on the erection, start-up and commissioning of the said plant on site for the consideration and upon the terms and conditions hereinafter stipulated.”

There is not much controversy about the supply of equipment and materials agreement. The dispute is only in relation to licence know-how and engineering agreement. The Revenue laid much emphasis on Clauses 6 and 8; which read as under:

“6. DML’s KNOW-HOW means up to date technical information and know-how relevant to the PLANT and within the scope of the DAVY PROCESS and within the control of DML at the date of this Agreement including, but not limited to, designs, data from process developments and experiments, process data, manufacturing data, drawings, specifications, procedures, flowsheets, construction and operation techniques, the composition, nature, properties and use of the catalyst used in the DAVY PROCESS (but not information and know-how relating to the manufacture, recovery or refining of rhodium containing materials) and other useful technical information and know-how, relevant to the PLANT.

8. DML’s IMPROVEMENTS means technical information and know-how relevant to the PLANT relating to and within the scope of the DAVY PROCESS

and coming within the control of DML after the date of this Agreement, including, but not limited to, designs, data from process developments and experiments, process data, manufacturing data, drawings, specifications, procedures, flowsheets, construction and operating techniques, the composition, nature, properties and use of the catalyst used in the DAVY PROCESS (but not information and know-how relating to the manufacture, recovery or refining of rhodium-containing materials nor to information and know-how relating to production of synthesis gas) and other useful technical information and know-how and improvements thereto and patents granted and patent applications filed in India, thereon, which have been used in the commercial practice of the DAVY PROCESS, and which are relevant to the PLANT.”

The respondent took shelter under the portion “but not information and know-how relating to the manufacture, recovery or refining rhodium-containing materials nor to information and know-how relating to production of synthesis gas”; and pleaded that the know-how was for the limited purpose of erection and installation of the machinery and not in absolute terms. It has also placed emphasis upon the following sub-clauses:

- “(a) Non-resident granting licences for using DML process with specific condition against sub-licensing, assigning, mortgaging etc., without written consent of non-resident;
- (b) Licence is non-exclusive and the APCL has not acquired any exclusive right over the patent of it;
- (c) DML was free to supply and grant licences over the same technical know-how and patent through out the world;
- (d) DML has not transferred technical know-how and patent rights as part of different trade sales transaction to APCL; and

(e) Confidential clause restraining APCL from divulging what was parted by the non-resident.”

The discussion in this behalf is required to commence from the stage of taking note of the purport of Section 9 of the Act. The section deals with the amounts paid to the agency outside India which in turn is deemed to be an income accruing or arising within India. The circumstances under which such a presumption can be drawn are enlisted in the section. One of the items covered by Section 9 of the Act is royalty. Section 9(1)(vi) reads:

“(1) The following incomes shall be deemed to accrue or arise in India-

.....

(vi) income by way of royalty payable by-

(a) the Government; or

(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is a non- resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India.”

The proviso and remaining part of the section deals with the other details as well as exemptions. It is not in dispute that the amount paid to the foreign company is otherwise taxable under Section 9.

The basis for the respondent to plead that the amount paid

by it to the foreign company is not royalty is that (a) it is paid in lumpsum and not year after year for the use of patent or any facility; (b) the transfer of technical know-how or patent was for the limited purpose of installation and fixing the machinery and (c) that the arrangement is covered by the DTA Agreement. This plea did not weigh with the assessing officer as well as the Commissioner. The Tribunal however accepted that.

Royalty, by its very nature is a sum payable to the owner of a design, invention or trade mark by another for using it. It is clearly opposed to an outright transfer. The original patent or the facility of other description continues to remain with the owner and the user would be permitted to avail the facility in a limited or absolute manner on payment of royalty. On cessation of the arrangement, the user loses the right and the owner of the facility gets full and absolute control over it. A note of caution need to be added here. Though the royalty is required to be paid periodically during the subsistence of the arrangement, it is quite possible for the parties to agree for payment of a lumpsum. However, a lumpsum payment would answer the description of royalty, if only it is referable to a fixed period for which the facility can be utilised. A lumpsum payment, without mentioning the period is prone to take away such amount from the definition of royalty.

In the Law Lexicon by Sri P. Ramanatha Aiyar the following meaning is ascribed to the word royalty.

“ROYALTY. Has several meanings: (1) percentages or dues payable to landowners for mining rights; (2) sums paid for the use of a patent; (3) percentages paid

to an author by a publisher on the sales of a book.

OTHER DEFINITIONS: A royalty is a tax or duty paid to the owner of a patent for the privilege of manufacturing or using the patented article;

Royalty is a tax or duty paid to the owner of a patent for the privilege of manufacturing or using the patented article; something proportionate to the use of a patented device, in other words, a kind of exercise, specific sums paid annually, or at other stated periods, for the right to use a patented device, whether it is used much or little or not at all.

“Royalty” is the most appropriate word to apply to rental based on the quantity of coal or other mineral that is or may be taken from a mine.”

In Corpus Juris II, royalty is defined as under:

“Royalty or Royalties. A. As Noun. In its primary and natural sense, merely the English translation or equivalent of “regalitates,” “jura regalia,” “jura regia.” Formerly the word referred to the prerogative of the king to take gold and silver discovered in land privately owned.

In case of copyrights and patents the term is commonly used to designate the share of the proceeds of property paid to a person having some proprietary or creative interest therein by another who has obtained from the payee an absolute or qualified ownership of such property. It has been defined as a tax or duty paid to the owner of a patent for the privilege of manufacturing or using the patented article; rental; something proportionate to the use of a patented device; in other words, a kind of exercise; specific sums paid annually, or at others stated periods, for the right to use a patented device, whether it is used much or little or not at all. The word has been held an appropriate term as applied to improvements which are nonpatentable.

In oil and gas leases, a share of the product or profit reserved by the owner for permitting another to use the property; the amount reserved or the rental to be paid to the

original owner of the whole estate; the compensation for the privilege or rights created by the lease; the compensation provided for the privilege of drilling for oil and gas, and consists of a share in the oil and gas produced under existing leases; the share of the product or profit paid to the owner of the property. As applied to an existing lease, a share in the oil and gas produced, but the term does not include a perpetual interest in the oil and gas in the ground.”

If these tests are applied to the amount that is paid by the respondent to the foreign company, it becomes difficult to treat it as royalty. Firstly, the amount is paid in lumpsum and it is not referable to any particular period. Secondly, though there is a possibility to interpret the clauses in such a way that,

- (a) the foreign company retained with it the ultimate patent but permitted the respondent in a related manner, that too by prohibiting the sub-lease or other unauthorised uses, thereby bringing the act nearer to the one of the royalty, and
- (b) the transfer was not on payment of any periodical royalty, but was only to the extent which is necessary for installation and thereby treating it as a concomitant part of the comprehensive agreement;

the predominant factors are suggestive of the fact that the consideration paid by the respondent, even under the licence know-how, and engineering agreement or against the DTA Agreement being treated not as royalty. Another reason is that it is not a mere licence know-how, but is coupled with engineering.

Assuming that the amount deserves to be treated as royalty, there is one strong circumstance that militates against the

department. Section 90 of the Act provides for the relief against double taxation. The provision reads as under:

“Agreement with foreign countries or specified territories.

90. 1[(1)] The Central Government may enter into an agreement with the Government of any country outside India—

(a) for the grant of relief in respect of –

(i) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or

(ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, or,

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country or specified territory, as the case may be, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income-tax under this Act and under the corresponding law in force in that country or specified territory, as the case may be and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.

(2A) Notwithstanding anything contained in sub-section (2), the provisions of Chapter X-A of the Act shall

apply to the assessee even if such provisions are not beneficial to him.

(3) Any term used but not defined in this Act or in the agreement referred to in sub-section (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf.

(4) An assessee, not being a resident, to whom an agreement referred to in sub-section (1) applies, shall not be entitled to claim any relief under such agreement unless a certificate of his being a resident in any country outside India or specified territory outside India, as the case may be, is obtained by him from the Government of that country or specified territory.

(5) The assessee referred to in sub-section (4) shall also provide such other documents and information, as may be prescribed.

Explanation 1.—For the removal of doubts, it is hereby declared that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such foreign company.

Explanation 2.-- For the purpose of this section, “specified territory” means any area outside India which may be notified as such by the Central Government.

Explanation 3.-- For the removal of doubts, it is hereby declared that where any term is used in any agreement entered into under sub-section (1) and not defined under the said agreement or the Act, but is assigned a meaning to it in the notification issued under sub-section (3) and the notification issued thereunder being in force, then, the meaning assigned to such term shall be deemed to have effect from the date on which the said agreement came into force.”

It is not dispute that an agreement referable to Section 90 of the Act exists between India and the United Kingdom during the assessment years in question. The clauses in the DTA Agreement between India and United Kingdom cover the situations when the royalty is paid in respect of (a) any patent, trade-mark, design or model, plan, secret formula or process; (b) industrial, commercial or scientific equipment, or information concerning industrial, commercial or scientific experience; and (c) any copy right or literary, artistic or scientific work, cinematographic films, and films or tapes for radio or television broadcasting.

The relevant clause of the convention dated 16-04-1981 between the Government of India and Government of United Kingdom of Great Britain and Northern Ireland reads:

“Article 7: Business profits – (1) The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.”

Wide range of Income tax, arising out of the contracts between the parties hailing from the respective countries, are dealt with. Payment of royalty and fee for technical service is dealt with under Article 13 which reads:

“Article 13 – Royalties and fees for technical services

– (1) Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

(2) xxx

(3) The term “royalties” as used in this article means payments of any kind including rentals received as a consideration for the use of, or the right to use—

(a) any patent, trade-mark, design or model, plan, secret formula or process;

(b) industrial, commercial or scientific equipment, or information concerning industrial, commercial or scientific experience;

(c) any copyright of literary, artistic or scientific work, cinematographic films, and films or tapes for radio or television broadcasting;

But does not include royalties or other amounts paid in respect of the operation of mines or quarries or of the extraction or removal of natural resources...”

[clause (2) is omitted]

A comparison of the definitions or descriptions of the word “royalty” under Explanation 2 of Section 9(1)(vi) of the Income Tax Act, on the one hand, and the one, under Clause 13(3) of the DTA Convention, on the other hand, discloses that the amount, even if called as royalty, paid by the respondent, to the foreign company gets attracted by the DTA Convention.

The scope and ambit of similar clauses in double tax avoidance conventions was dealt with by various High Courts in several cases. In **COMMISSIONER OF INCOME TAX vs. NAYVELI LIGNITE CORPORATION LTD** (2 supra), the Madras

High Court dealt with a clause, which is similar to the one, incorporated under the contract between the respondent therein, a foreign company. It has already been mentioned that the transfer of know-how was for a limited purpose of recovery of the machinery, etc., that was supplied, and not in general terms. The Madras High Court took the view that it was covered under the DTA regime. Similarly in **COMMISSIONER OF INCOME TAX vs. D.C.M. LTD**

(3 supra), the Delhi High Court held:

“The know-how is intellectual property and excluded clauses referred to above pertained to the know-how of secret formula or process and the imparting of any information concerning the working thereof. The assessee, in our view, is right in submitting that the things for the transfer of which DCM agreed to pay to TL 81,55,000 as such squarely fell within these two exclusionary clauses which do not form part of the definition of the term ‘royalty’ under art.XIII(3) of the DTAA. The IT authorities in our view, were not right in being influenced by the term ‘payments of any kind’ preceding the definition of this term under the DTAA.”

This Court, way back in 1977, dealt with a convention between India and Holland, in the context of Section 90 of the Act. Justice Chinnappa Reddy, as His Lordship then was, took note of all the relevant cases that were decided by that time and held in ***Hindustan Shipyard’s*** case (4 supra) as under:

“Para28: It is true that the Polish company agreed to render certain limited services. But those services were connected with the effective fulfilment of the contract of sale and were merely incidental to the

contract, usually included in all such contracts, by way of guarantee of the efficient working of the products sold. They were not services which created an interest of the type seen in the case of Carborundum Co. (supra). We answer the question referred to us in favour of the assessee. The assessee is entitled to the costs of the reference. Advocate's fee Rs.250."

In **COMMISSIONER OF INCOME TAX vs. SUNDWIGER EMFG & CO.** (5 supra), this Court dealt with a transaction, which is similar to the one, which is the subject matter of this case, and held that the different components of the contract cannot be read in isolation. The relevant portion reads,

"Para 21: A plain and cumulative reading of the terms and conditions of the contract entered into between the principal to principal i.e., foreign company and Midhani i.e., preamble of the contract, Parts I and II of the contract and also the separate agreement, as referred to above, would clearly show that it was one and the same transaction. The one cannot be read in isolation of the other. The services rendered by the experts and the payments made towards the same was part and parcel of the sale consideration and the same cannot be severed and treated as a business income of the non-resident company for the services rendered by them in erection of the machinery in Midhani unit at Hyderabad..."

From the above discussion, it becomes clear that,

- a) the amount paid by the respondent to the foreign company is part of lumpsum consideration for supply of technical know-how, machinery installation and erection and the

same cannot be treated as royalty and

- b) even if the amount is to be treated as royalty, it stands covered by the DTA – convention dated 16-04-1981 and thereby the amount is not liable to taxation in India.

Therefore, questions 1 to 3 are answered against the Revenue.

So far as question Nos.4 and 5 are concerned, certain facts need to be noticed. It is not in dispute that it is only on 19.11.1990, that an order came to be passed under Section 163(2) of the Act treating the respondent as an agent of non-resident. The time for filing returns for assessment year 1988-89 was to expire by November, 1987 and for assessment year 1989-90, in November, 1989. Since it is only after 19.11.1990, the respondent was treated as the agent of a non-resident, there was no obligation on the respondent to file a return for 1988-89 and 1989-90 for which the time for filing return had expired in November, 1987 and November, 1989 itself. In that view of the matter, there was no obligation on the part of the respondent to discharge the statutory obligation prior to 19.11.1990. As there was no obligation on the part of the respondent to file a return prior to the date of its being treated as a representative of the foreign company, there was no obligation to file returns prior to that date. Therefore, the liability to pay interest under Section 139(8) of the Act, cannot be fastened on the respondent.

Apart from this, definition of tax does not include component of interest. Section 2(43) of the Act defines tax in relation to the assessment year and the same is mentioned hereunder:

“Section 2(43) " tax" in relation to the assessment year commencing on the 1st day of April, 1965 , and any subsequent assessment year means income- tax chargeable under the provisions of this Act, and in relation to any other assessment year income- tax and super- tax chargeable under the provisions of this Act prior to the aforesaid date.”

Therefore, question Nos.4 and 5 are to be answered in the affirmative i.e., against the Revenue and in favour of the respondent.

All the Appeals are accordingly dismissed. Miscellaneous Petitions, if any pending in these appeals shall also disposed of. There shall be no order as to costs.

L. NARASIMHA REDDY, J

CHALLA KODANDA RAM, J

06-11-2014

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[\[1\]](#) (1968) 68 ITR 786 (MAD)

[\[2\]](#) (2000) 243 ITR 459 (Mad)

[\[3\]](#) (2011) 336 ITR 599

[\[4\]](#) (1977) 109 ITR 158 (AP)

[\[5\]](#) (2003) 262 ITR 110 (AP)

[\[6\]](#) (2010) 329 ITR 442

[\[7\]](#) (2014) 48 TAXMANN.COM 67 (Bombay)